No. 86-1456

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

DORIS L. PYZER, Executrix of the Estate of
LLOYD E. PYZER, M.D.,
Appellant,

vs.

CAROL PERRY and STANLEY PERRY,
Appellees.

On Appeal From the Court of Appeal of the State of California

MOTION TO DISMISS APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA

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On Appeal From the Court of Appeal of the State of California

MOTION TO DISMISS APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA

Appellees, Carol Perry and Stanley Perry, bring this Motion to Dismiss the Appeal of Doris L. Pyzer, Executrix of the Estate of Lloyd E. Pyzer, M.D. The appeal is from the final judgment of the California Court of Appeals, First Appellate District, Division 4, dated September 17, 1986, denied review by the California Supreme Court on December 10, 1986.

Dismissal should be granted pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States on the grounds that: 1) the judgment rests upon adequate non-federal bases; 2) the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on; 3) the federal questions are not substantial.

OPINIONS BELOW

The opinion of the California Court of Appeal for the First Appellate District, Division Four, which appears in the appendix to appellant's Jurisdictional Statement, at p. A-1, is not reported.[1]

The denial of review by the California Supreme Court is not reported. (appellant's app. B-1).

STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

> No state . . . shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article I, Section 7:

> (a) A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws.

California Constitution, Article VI, Section 6:

> To improve the administration of justice, the counsel shall . . . adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform the functions described by statute.

California Constitution, Article VI, Section 13:

> No judgment shall be set aside, or new trial granted, in any cause on the ground of misdirection of the jury or of the improper admission or rejection of evidence, or any error as to the manner of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that

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[1] All references hereinafter to "appellant's app." refer to the appendices, A through G, inclusive, set forth in appellant's Jurisdictional Statement filed before this Court. All references hereinafter to "appellee's app." refer to the appendices, A and B, set forth herein.

the error complained of has resulted in a miscarriage of justice.

California Code of Civil Procedure, Section 1141.14:

Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter.

California Evidence Code, Section 351:

Except as otherwise provided by statute, all relevant evidence is admissible.

Rule 16.1(b), Rules of the Supreme Court of the United States

The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

Rule 1612, California Rules of Court:

The parties to the arbitration shall have the parties to take depositions and to obtain discovery and to that end may exercise all the rights, remedies, and procedures, and shall be subject to the same duties, liabilities and obligations as provided in Part 4, Title 3, Chapter 3 of the Code of Civil Procedure, except that all discovery shall be completed not later than 15 days prior to the date set for the arbitration hearing unless the court, upon a showing of due cause, makes an order granting an extension of time within which discovery must be completed.

Rule 1616(c), California Rules of Court:

The case shall be tried as though no arbitration proceedings have occurred. No reference may be made during trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration

hearing, or to any other respect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial.

STATEMENT OF THE CASE

This Appeal arises from a medical malpractice action filed against Lloyd E. Pyzer, M.D. Appellee Carol Perry suffered a cardiac arrest with permanent brain damage as a result of unidentified "diet pills", including amphetamines, barbiturates, thyroid hormones and other substances, routinely dispensed by Dr. Pyzer at his weight clinic.

Appellant stipulated to Judicial Arbitration. The matter was heard by retired Judge Peter Anello who awarded $750,000.00 damages against Dr. Pyzer. Appellant rejected the award and sought a trial de novo.

The central issue at trial was whether Dr. Pyzer was negligent either in treating Carol Perry or in failing to disclose the nature of the diet pills dispensed to her. By special verdict, the jury determined that Dr. Pyzer was negligent and that this negligence was a legal cause of injury. (appellant's app. F1-4).

At the trial, Pearl Chames, Carol Perry's mother, testified that she collected various medications from the Perry household and took them to the hospital but she did not know of the location or whereabouts of the drugs or the shoe box thereafter. (appellant's app. C6-7; 20-21).

Appellant contended that, at the arbitration hearing, Ms. Chames had testified that the shoe box was returned and she flushed some of the drugs away. (appellant's app. C-22). However, there is no record of the testimony during the arbitration hearing.

The trial judge held that Rule 1616(c) of the California Rules of Court precluded use of arbitration testimony for impeachment or any other purpose (appellant's app. G-2). No objection was made by appellant on *any* constitutional ground at trial.

Appellant brought a motion to reopen the trial for additional evidence on the grounds that the purported prior statement was admissible to impeach the witness and further, that he would be denied a fair trial unless the court departed from strict compliance with Rule 1616(c). (appellant's app. D1-6). Again, no constitutional objection was urged by appellant. The motion was denied.

In an unsuccessful appeal to the California Court of Appeal, appellant argued that the trial court had discretion to suspend operation of Rule 1616(c) and should have done so. He also argued that Rule 1616(c) violated Article VI, Section 6, of the California Constitution because it was inconsistent with statute, specifically California Evidence Code Section 351. For the first time appellant appeared to argue briefly that he had been deprived of due process under the Fourteenth Amendment. (appellee's app. A7-8).

The Court of Appeal affirmed the Trial Court's judgment under two independent bases: 1) Rule 1616(c) was valid as enacted by the Judicial Council pursuant to statutory authority; 2) even assuming error, there was no miscarriage of justice or prejudice to appellant. (appellant's app. A1-8).

Appellant then petitioned the California Supreme Court for review, arguing again that Rule 1616(c) was unconstitutional because it purported to modify Evidence Code Section 351 without statutory authority. For the first time, Appellant urged that Rule 1616(c) violated the Fourteenth Amendment equal protection clause. (appellee's app. B5-6). The petition for review was denied. (appellant's app. B-1).

SUMMARY OF ARGUMENT

This court lacks jurisdiction over this appeal because the judgment rests upon adequate non-federal bases; the federal questions were not properly raised or passed upon; and, no substantial federal question is presented. Dismissal is warranted for each of these reasons.

ARGUMENT

I

THE CALIFORNIA SUPERIOR COURT JUDGMENT RESTS UPON ADEQUATE NON-FEDERAL BASES

This Court has long adhered to the principal that it will not review state court judgments which rest upon independent and adequate state grounds, even where those judgments also decide federal questions. *Henry v. State of Mississippi* 379 U.S. 443, 446 (1965); *Herb v. Pitcairn* 324 U.S. 117 (1945).

> "The reason is . . . found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. *We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion. Herb v. Pitcairn,* 324 U.S. 117, 125-126. (emphasis supplied)."

In the instant case, the California Court of Appeal relied upon both Article VI, Section 6, and Article VI, Section 13, of the California Constitution as independently supporting their affirmation of the trial judgment. The Court of Appeal held that Rule 1616(c), California Rules of Court, was adopted by the Judicial Council pursuant to statutory authority. This follows the mandate of Article VI, Section 6, of the California Constitution that the council adopt rules for court administration, practice and procedure. The Court of Appeal separately held that, even assuming error by the trial court in applying Rule 1616(c), there was no miscarriage of justice or prejudice to appellant sufficient to grant his appeal under the California Constitution, Article VI, Section 13. (appellant's app. A1-8).

No federal ground was considered by the California Court of Appeal. The non-federal grounds relied upon fully, clearly, and rationally support the opinion. As there are adequate and inde-

pendent state grounds for the judgment, the Court should not review the federal questions raised by appellant.

II

THE STATE COURTS DID NOT EXPRESSLY PASS ON THE FEDERAL QUESTIONS WHICH APPELLANT FAILED TO PRESENT OR PRESERVE

It has been repeatedly held that this Court has no jurisdiction to review state court decisions unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, appellate jurisdiction fails. *Cardinale v. Louisiana* 394 U.S. 437, 438 (1969).

Further, where the highest state court has failed to pass upon a federal question, it is presumed that the omission was due to want of proper presentation unless the aggrieved party can affirmatively show the contrary. *Webb v. Webb* 451 U.S. 493 (1981); *Street v. New York* 394 U.S. 576, 582 (1969).

There are both policy and practical reasons for this rule. The principal of comity requires that a federal challenge to a state statute or official act be presented first to the state court. Further, this enables the court to develop an adequate record, identify any independent and adequate state grounds for the decision, and possibly construe the statutes so as to avoid or obviate the federal constitutional challenge. Failure to comply strictly with these requirements precludes review of the federal question by this court. *Webb v. Webb* 451 U.S. 493 (1981).

A. The Federal Questions Were Not Timely or Properly Raised

In *Webb v. Webb*, the court held that the bare references to "full and faith and credit" were insufficient to raise a federal question, stating:

> At a minimum, however, there should be no doubt from the record that a claim under a federal statute or the federal Constitution was presented to the state courts and that those courts were appraised at the nature of substance of the Federal Claim at the time and in the manner required by the State law. 451 U.S. 493, 501.

In this case, appellant made no objection or protest based any constitutional protection at the trial court level. No assertion was made that the due process or equal protection clauses of the United States Constitution were violated. To the contrary, appellant's arguments were primarily directed to Article VI, Section 6, of the California Constitution which provides for court administration and procedures. Appellant also failed to rely upon Article I, Section 7, of the California Constitution, which provides, in pertinent part:

> (a) A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws.

In affirming the judgment of the Superior Court, the Court of Appeal relied upon the extensive portion of appellant's Opening Brief which was directed towards issues raised under procedural mandates of the California Constitution or statutes.

In California, an appellate court will ordinarily not consider procedural defects or erroneous rulings in conjunction with relief sought or defenses asserted, where a specific ground could have been, but was not, presented to the lower court. (*See, e.g., Eason v. Dickson* 390 F.2d 585, 589 (9th Cir. 1968), *cert. denied,* 392 U.S. 914 (1968); *Dimmick v. Dimmick* 58 Cal.2d 417, 422, 374 P.2d 824 (1962); *Sommer v. Martin* 55 Cal.App. 603, 610, 204 P.33 (1921).

> Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence.... The law casts upon the party the duty of looking after his legal rights.... If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal. (citation). *Sommer v. Martin, supra,* 55 Cal.App. 603, 610.

This is true for any constitutional question later urged on appeal. It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest possible opportunity or it

will be considered as waived. *Jenner v. City Council* 164 Cal.App.2d 490, 498, 331 P.2d 176 (1958).

No Fourteenth Amendment due process agreement was urged until appeal to the Court of Appeal. The Fourteenth Amendment equal protection clause was not asserted until appellant petitioned the California Supreme Court for review.

Appellant's failure to raise the federal issues in a timely and proper manner precludes review of these questions by this Court.

B. The Federal Questions Were Not Expressly Passed On By the California Superior Court, Court of Appeal, or Supreme Court

Since the federal constitutional issues were not raised in appellant's Motion to Reopen the Trial, it follows that the trial court had no opportunity to consider these issues.

In dismissing appellant's appeal, the California Court of Appeal stated that Rule 1616 (c) was valid under the California Constitution, Article VI, Section 6, because it was consistent with Evidence Code Section 351 and properly enacted pursuant to California Code of Civil Procedure Section 1141.14.

The Court of Appeal also relied upon Article VI, Section 13, of the California Constitution in holding that, in any event, the exclusion of the arbitration testimony did not result in a miscarriage of justice or prejudice to appellant so as to warrant setting aside the judgment or granting a new trial.

The California Court of Appeal does not ever refer to the federal due process issue, let alone make any decision in this regard. Since the equal protection issue was not presented to the California Court of Appeal, the decision cannot be viewed as even an implicit ruling on this question. (appellant's app. A1-8).

Although appellant raised the due process and equal protection issues in his Petition for Review to the California Supreme Court, review was denied without providing any reasons. While appellant may argue that this renders the decision ambiguous and therefore, it could be viewed as implicitly deciding the federal constitutional questions, this court should choose an interpretation that does not

raise a constitutional question. *Black v. Cutter Laboratories* 351 U.S. 292 (1956). Since the denial of the Petition for Review could be based on either of the grounds set forth in the opinion of the California Court of Appeal, there is nothing on the record to suggest that the California Supreme Court even considered the federal constitutional issues.

III

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED TO THE UNITED STATES SUPREME COURT

The lack of substantial federal question deprives this Court of jurisdiction to review this appeal. *Rice v. Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70 (1955) (writ of certiorari); *Equitable Life Assurance Society v. Brown* 187 U.S. 308, 311 (1902).

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes an evasion. *Rice v. Sioux City,* 349 U.S. 70, 73-74.

Although appellant here seeks to present what is, perhaps, an interesting abstract issue, no substantial federal question is presented. No due process or equal protection argument has been passed on by the California state courts which, instead, relied upon fully adequate non-federal grounds. This Court should thus avoid considering any constitutional assertion. *Black v. Cutter Laboratories, supra.* It is also clear that the California state statutes and court rules in question do not go beyond the range of

state action allowed by the Fourteenth Amendment. (*See, Martin v. Walton* 368 U.S. 25 (1961)).

The California Court of Appeal found that strong public policy supports the exclusion of evidence of testimony taken during arbitration. It also recognized an express legislative intent to keep judicial arbitration as informal and private as possible. (appellant's app. A5-7).

Here, appellant not only failed to properly raise any federal question at the trial level, appellant failed to properly provide any proper offer of proof or to *voir dire* the witness, Pearl Chames. No record exists of the arbitration proceeding. Appellant further failed to examine or cross-examine any other witness concerning the contents and whereabouts of the shoebox of medication in question. Appellant did not conduct any pre-trial discovery on this point.

Appellant elected to accept arbitration. California state courts have upheld and encouraged the use of arbitration based on strong public policy as expressed by the California legislature. The affirmation of judgment by the California Court of Appeal and denial of review by the California Supreme Court are correct. Dismissal should be granted as appellant has failed to suggest any substantial federal question adequate for this court to grant jurisdiction.

CONCLUSION

Although appellant seeks review of federal questions pertaining to the Fourteenth Amendment due process and equal protection clauses, these issues were not timely or properly raised and were not expressly passed on by the state courts below. The judgment of the trial court rests upon adequate non-federal bases fully supported by strong, rational public policy. No substantial federal question is presented. For each of these reasons, this Court lacks jurisdiction to review the federal questions offered and accordingly, appellees respectfully request that the appeal be dismissed

Dated: April 6, 1987

POPELKA, ALLARD, MCCOWAN & JONES

By THOMAS BRAZIER
Attorney for Appellees

(Appendices follow)

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Appendix A

Civil A028061
In the Court of Appeal
of the
State of California
Sixth Appellate District
Carol Perry and Stanley Perry,
Plaintiffs and Respondents,

vs.

Doris L. Pyzer, Executrix of the Estate of
Lloyd E. Pyzer, M.D.,
Defendant and Appellant.

Appellant's Opening Brief
On Appeal from the Judgment of the
Superior Court of California
Santa Clara County
The Honorable Bruce F. Allen, Judge

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STATEMENT OF THE CASE

This is an appeal from a judgment in a medical malpractice case in which the judge ruled at trial that evidence of prior testimony of a witness which was made in the course of an arbitration hearing in the same case could not be admitted to impeach the witness. The judge followed Rule 1616 of the Rules of Court in so ruling. The witness, the mother of the plaintiff and a major witness for the plaintiff, earlier testified that she had destroyed a quantity of medication. The part of the medication which was preserved was introduced at trial against the defendant. At trial the witness denied destroying the medication. The defendant was substantially prejudiced thereby. Appellant contends that the judge had discretion, even a duty, to suspend the operation of Rule 1616, and that his failure to permit the impeaching evidence to come in was an abuse of that discretion and a breach of that duty, calling for a reversal of the judgment taken against appellant and a remand for new trial. Appellant further contends that as applied, Rule 1616 is unconstitutional and void, as it was made by the Judicial Council acting in excess of its authority, and that the defendant's right to due process was invaded by such application.

THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE OFFERED TO IMPEACH PLAINTIFF'S WITNESS

When the trial judge ruled that impeaching evidence could not come in against the witness Chames, he did so feeling that he was bound to follow Rule 1616, although he was in disagreement with it. (R. Gorley 2/14). A rule is a rule, he said. He had been informed that the witness had testified in the prior arbitration hearing that she had received back a shoe box filled with drugs and that she had destroyed the contents of the box, except for three envelopes identified with the defendant physician, which were already in evidence. (R. Evans 28/7), (C. 19-26).

Rule 1616 provides in pertinent part that, at a trial de novo:

> "(c) The case shall be tried as though no arbitration proceedings had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, *or by way of impeachment*, or for any other purpose at the trial." [emphasis supplied] [1]

The trial judge had discretion to suspend operation of Rule 1616 and in the interest of justice, he was bound to do so. Without the impeaching testimony, the jury was left in ignorance of the witness' destruction of the box of drugs, and unable to relate that fact to the case. In the early case of *People v. Silva* (1898) 121 Cal. 668, 670, 54 P. 146, we find the powerful and lasting pronouncement that "When strict observance of the rule would

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[1] The Federal Rule is otherwise. Rule 500-7(b) for the Northern District of California provides as follows:
Trial De Novo (b) *Limitation on Evidence.* At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, *except that statements made by a witness at the arbitration hearing may be used for impeachment only.* [emphasis supplied]

operate to defeat or impede justice it is always within the power of the court to suspend the rule, and it is its duty to do so."

Rule 1616 is part of the rules formulated by the Judicial Council to comply with *Code of Civil Procedure § 1141.14*, which states:

> "Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter. [Stats. 1979, c.473, § 2, operative July 1, 1979.]

Yet in *Dikkers v. Superior Court in and for Los Angeles County* (1948) 88 Cal. App.2d 816, 199 P. 2d 709, the Court stated: "While rules of court may facilitate business and promote convenience of litigants, acts essential to jurisdiction as fixed by statute may not be modified by rule, and *any rule that operates to deprive a party of a statutory right is to that extent void.*" [emphasis supplied]

Clearly the purpose of the restrictions set out in Rule 1616 were to comply with the statutory admonitions of CCP §§ 1141.11 et seq, which prohibit disclosure at trial, directly or indirectly, that there was any arbitration proceeding in the matter. Accordingly, counsel pointed out to the trial judge that it was not necessary to make any mention of the arbitration hearing in which the inconsistent statement was made, and argued that the earlier testimony had independent significance which did not depend upon its having been part of an arbitration hearing, and that the defendant could not obtain a fair trial unless the jury had an opportunity to hear the earlier statements. Nevertheless, the impeaching testimony was excluded. (R. Gorley 2/14)

THE DEFENDANT WAS SEVERELY PREJUDICED BY HIS INABILITY TO IMPEACH THE WITNESS

Witness Chames was the mother of plaintiff Carol Perry (R. Evans 4/19-21). She testified as to the plaintiff's childhood, her achievements and activities in school, her employment and her married life (R. Evans 5-10). She testified further to the

profound effect of the cardiac arrest upon the personality and the daily life of the plaintiff (R. Evans 13-16). Her testimony also revealed her dislike for the defendant, to the degree that she warned her daughter not to go to him because he wasn't a very good doctor (R. Evans 17,18).

When Chames testified under cross examination that she had not destroyed the medications received back from the hospital, even that she had not even seen them (R. Evans 26-28), defense counsel were nonplussed. The shoe box full of medication which had been gathered up by the witness Chames in her daughter's house had early been a focus of the defense rationale (C. 7,8), and it was important that the jury see that the fact that the plaintiff had stockpiled prescription medication from both of the physicians treating her, and that her mother had destroyed all of it except the three envelopes in evidence, raised serious questions about the causal chain that led up to the cardiac arrest itself as well as potentially damaging the credibility of this witness. The amount, nature and source of the medications found in the plaintiff's home could disclose additional alternative possibilities for the true cause of her injury. There was a conflict in the evidence as to the contents of the shoe box (R. Gorley 108/25). How that conflict was resolved would bear heavily on the posture of the case for the jury. The Smith Kline laboratory report showed that upon admission to the hospital the plaintiff had barbiturates in her blood, above the therapeutic level, and that the gas chromatograph showed a "spike" for an unidentified substance (R. Gorley 78,79). A test by another laboratory picked up amephetamine in the high therapeutic range (R. Gorley 80). How much weight these laboratory reports would carry and a perception of how they reflected upon the true events that led up to the plaintiff's injury would be greatly influenced by a full disclosure of the contents of the shoe box. The fact that the mother of the plaintiff destroyed those contents, then denied doing so, was critical to an effective defense. Keeping those facts from the jury prejudiced the defendant.

It was a close question, even so. The jury was out for four days (C.17, 32). The verdict assigned 55% negligence to plaintiff and awarded no punitive damages (C. 34). A verdict for the defen-

dant might well have followed full disclosure of the witness Chames' testimony.

AS APPLIED, RULE 1616 IS UNCONSTITUTIONAL

The purpose of the Rules of Court is to make for the efficient and lawful administration of justice. Rule 1616 sacrifices justice for efficiency.

The Rules of Court are promulgated by the Judicial Council pursuant to Article 6, Section 6 of the California Constitution, which directs:

> "To improve the administration of justice the council shall . . . adopt rules for court administration, practice and procedure, *not inconsistent with statute*, and perform the functions prescribed by statute." [emphasis supplied]

The requirement that Rules conform to statute came earlier. Prior to its amendment, the Constitution, in Article 1 Section 1a, provided that the Council shall:

> "(5) Adopt or amend rules of practice and procedure for the several courts *not inconsistent with laws that are now or may hereafter be in force*". [emphasis supplied]

Rule 1616 is not in accord with statute. Evidence Code Section 351 states that, except as otherwise provided by statute, all relevant evidence is admissible. Section 210 defines relevant evidence as: "evidence, *including evidence relevant to the credibility of a witness* or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." [emphasis supplied]

It follows that a rule of court which bars evidence relevant to the credibility of a witness is to that extent void. The rule is inconsistent with the provisions of the evidence code and its enactment was therefore ultra vires. In *Albermont Petroleum Limited v. Cunningham* (1961) 186 Cal. App. 2d 84, 9 Cal. Rptr. 405, it was said, "Rules adopted by judicial council, *if they do not transcend legislative enactments*, have force of positive law and are as binding on the court and parties as procedural statutes."

[emphasis supplied]. Where the rule purports to transcend statute, it must perforce be ignored.

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS BY THE COURT'S RULING

When a party is prevented from bringing out prior inconsistent statements of an opposition witness, the door to perjury is opened. When a defendant is prevented from proving that the mother of the plaintiff destroyed evidence, he is deprived of his Fourteenth Amendment due process right. Counsel for the defendant contended at trial that the right of the defendant to a fair trial on the merits was defeated if he was unable to present evidence which tended to prove perjury by the plaintiff's mother and her destruction of physical evidence (C. 19-26). The rule should have been disregarded, as in *In re Robin M.* (1978) 21 Cal.3d 337, 346, 146 Cal. Rptr. 352, (detention of minor).

Perjury of a witness destroys due process. This question has been faced in cases in which a criminal defendant contemplates perjury and conceals facts from counsel. The Constitution does not recognize the dilemma facing the client who decides that preservation of his freedom to lie under oath is more important than full disclosure to counsel, and who later suffers the consequences; the Constitution does not guarantee a criminal defendant a right to testify falsely *Harris v. New York*, 401 U.S. 222, 225 (1971). "(W)hen defendants testify, they must testify truthfully or suffer the consequences." *United States v. Havens*, 446 U.S. 620 at 626 (1980). "No lawyer will have knowingly participated in presenting perjured testimony. That is, in and of itself, a matter of crucial importance to the legal system's goal of seeking the truth" (*Havens* at 626). Unfortunately, plaintiff's lawyers stood silent when defense counsel told the trial judge that they were competent witnesses for impeachment testimony. No counsel for the plaintiff, neither Mr. Brazier nor Mr. Walker, disputed defense counsel's assertion that they, as well as both defense counsel, could testify to the fact of the prior inconsistent testimony of the witness Chames (R. Gorley 1/10-3/8). They took refuge in the Rule. Strict application of Rule 1616 will open the door to perjury and invite affected parties to depart selectively from testimony given in arbitration where that testimony is

uncomfortable for them. The jury at a trial de novo will be none the wiser, but justice will be ill served.

CONCLUSION

In summary, it is clear that the trial court erred in refusing to allow impeachment of the witness Chames, that the error caused substantial prejudice to defendant in that he was unable to present a complete defense and was thereby deprived of due process, and the system of justice was perverted in providing the witness the refuge of Rule 1616.

WHEREFORE, defendant prays that this Court reverse the judgment from which this appeal was taken.

Francis E.X. Murphy
Attorney for Appellant

Appendix B

Civil A028061
In the Supreme Court of the
State of California

Carol Perry and Stanley Perry,
Plaintiffs and Respondents,

vs.

Doris L. Pyzer, Executrix of the
Estate of
Lloyd E. Pyzer, M.D.,
Defendant and Appellant.

Petition for Review
of Decision of the Court of Appeal,
First Appellate District, Division Four

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Doris L. Pyzer

In the Supreme Court of the
State of California

Carol Perry and Stanley Perry,
Plaintiffs and Respondents,

vs.

Doris L. Pyzer, Executrix of the
Estate of
LLoyd E. Pyzer, M.D.,
Defendant and Appellant.

PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California:

Doris L. Pyzer, Executrix of the Estate of LLoyd E. Pyzer, defendant and appellant, respectfully petitions for review following decision of the Court of Appeal, First Appellate District, Division Four, per Anderson, P.J., filed on September 17, 1986.

QUESTION PRESENTED

Is Rule 1616 (c) of the Rules of Court unconstitutional?

STATEMENT OF THE CASE

The appeal herein arose out of the denial of a defense motion to introduce impeaching testimony in a medical malpractice trial. The co-defendant physician had settled before trial. The witness was the mother of the plaintiff. The evidence sought to be introduced was that the witness had earlier testified that she had destroyed evidence, to wit, a shoe box full of drugs and medication taken from the plaintiff's residence immediately after plaintiff had suffered a cardiac arrest. Only three small envelopes of drugs, which were identified as coming from this defendant, were kept. The earlier testimony was given at an arbitration hearing. At the trial de novo, the witness testified that she had not seen the other drugs after turning them over to the hospital and denied having received them back and denied having destroyed them. Without

the impeaching evidence, the jury found a fifty-five percent comparable negligence attributable to the plaintiff.

The trial Court relied on Rule 1616 (c) of the Rules of Court in ruling that the impeaching testimony could not come in.

ARGUMENT

RULE 1616 (c) IS UNCONSTITUTIONAL IN THAT IT PURPORTS TO MODIFY THE LAW OF EVIDENCE WITHOUT STATUTORY AUTHORITY

It is well that this question comes before you at this time. It is a matter of first impression, although it is now more than six years since Rule 1616 (c) became effective. Thousands of arbitrations are calendared yearly. This method of dispute resolution gains popularity as a relatively speedy and inexpensive alternative to litigating in court. In the very first year of the application of the Rules, there were 26,000 matters listed for arbitration, more than half of them court ordered arbitrations, according to the Administrative Office of the Courts.

The Judicial Council made Rules of Court 1600 et seq. for the conduct of court ordered arbitrations. Provision is made for a trial de novo.

Rule 1616 (c) purports to restrict the admissability of evidence at a trial de novo in clear and certain terms: " . . . No reference may be made to . . . the evidence adduced at the arbitration hearing, and none . . . may be used as affirmative evidence, *or by way of impeachment*, or for any other purpose at the trial." [emphasis supplied].

The law of evidence is the province of the legislature. *Miller & Lux Inc. v. Secara* (1924) 193 C 755, 227 P 171; *Corso v. Security-First Nat. Bank* (1959) 171 CA2d 816, 342 P2d 56. A delegation of the legislative power to make rules of evidence must be direct, specific and unambiguous. No inference of delegation of this power will suffice. Penumbral authority of the Judicial Council does not extend to the modification, amendment or abrogation of the law of evidence.

The application of Rule 1616 (c) abrogates the Evidence Code. All relevant evidence is admissable under Section 351 of the Evidence Code, "except as otherwise provided by statute". Other statutes do condition the admissability of evidence. No rule of court does. The heirarchy of authority is: first, the Constitution, then statute, then rule. Statute does not control constitution, nor does rule control statute. To be valid, the modification of evidence law must be statutory.

No statutory basis exists for this nullification of Evidence Code Section 351. Rule 1616 is part of the rules formulated by the Judicial Council to comply with *Code of Civil Procedure § 1141.14*, which states:

> "Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter. [Stats. 1979, c.473, § 2, operative July 1, 1979.]

The seductive first phrase of CCP § 1141.14, "Notwithstanding any other provision of law", invites the thought that the rules authorized by the chapter are intended to prevail over conflicting statutes. That is not what the phrase means. Parsing the sentence, we see that it says that whatever other laws might say about rule making, the Judicial Council is the body what will make the rules for these arbitrated matters. It does not say the rules will prevail over conflicting statutes. If it did, that would be an unconstitutional delegation of the legislative power, for constitutional stricture holds the Judicial Council to the making of rules "not inconsistent with statute".

The Judicial Council is a constitutionally authorized agency and therefore not subject to the ordinary limitations of the doctrine of separation of powers. Nevertheless, any delegation of power to this agency must be kept within the bounds of the constitutional authorization.

Rule 1616 (c) enlarges the statute by modifying the law of evidence. As Justice Tobriner stated, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are

void and court not only may, but it is their obligation to strike down such regulations. *Mooney v. Pickett* (1971) 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279. The statute, CCP § 1141.14, calls for rules governing arbitration proceedings, not court proceedings.

RULE 1616 (c) IS UNCONSTITUTIONAL AS OFFENDING THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The Federal constitution is offended by Rule 1616 (c). The Fourteenth Amendment rights of due process and equal protection are invaded. The Rule is unconstitutional in that by barring him from a full exposition of his case and preventing him from exposing perjured testimony, the litigant is deprived of a fair trial and due process. A defendant has the right to cross examine witnesses against him and to produce evidence in refutation. *Willner v. Committee* (1963) 373 U.S. 96, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224, 229; *Cal. Evidence 2d*, §§ 33, 34. The litigant is deprived of equal protection of the law as one of the group whose matters were arbitrated. Those who are impacted by the rule are litigants whose controversies are submitted to arbitration under the rules. They are many. The selection of this group for exclusion of impeaching evidence is not rationally necessary nor reasonable.

Dealing with the same question of admissibility, the Federal Rule does not discriminate. *Rule 500-7(b)* for the Northern District of California provides as follows:

> Trial De Novo (b) *Limitation on Evidence.* At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, *except that statements made by a witness at the arbitration hearing may be used for impeachment only.* [emphasis supplied]

The Federal rule shows a recognition of the constitutional requirements that apply to both Federal and State forums.

The integrity of the judicial process is undermined by insulating a perjuring witness from impeachment. The corrosion of the standards of candor, truth and fairness are readily perceived. No

attorney should knowingly participate in the presentation of perjured testimony. No attorney should be placed in a position in which his clients' interests appear best protected by invoking a rule which shelters perjured testimony. *United States v. Havens* (1980) 446 U.S. 620 at 626.

CONCLUSIONS

Rule 1616 (c) derives from a misreading of Section 1141.14 of the Code of Civil Procedure, in that the statute provides for the regulation of arbitration proceedings, not the regulation of court proceedings.

Rule 1616 (c) is facially unconstitutional. It lacks the necessary statutory basis to make any change in the law of evidence and should be struck down as an impermissible enlargement of the statute which is its foundation.

Rule 1616 (c) as applied infringes the Fourteenth Amendment due process and equal protection clauses by interfering with the right of the litigant to cross examine witnesses against him and to produce evidence in refutation.

Petitioner requests that this petition for review be granted and that the cause be set for argument.

Respectfully submitted,

Francis E. X. Murphy
Attorney for Defendant and
Appellant, Doris L. Pyzer